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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN BROADCASTING COMPANIES, INC.
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The decision in this case establishes significantly new legal standards governing the use of broadcast time by political candidates under Section 312(a)(7) of the Communications Act of 1934, as amended. The question presented is whether the construction placed on Section 312(a)(7) by the court of appeals is contrary to the purposes of the Communications Act, usurps the previously recognized discretion of broadcast licensees in the area of political programming, and violates fundamental First Amendment principles.

PARTIES BELOW

Petitioner ABC was a petitioner in the proceedings before the United States Court of Appeals for the District of Columbia Circuit, the court whose judgment is sought to be reviewed. Other petitioners in the court of appeals were CBS Inc. and National Broadcasting Company, Inc. The Federal Communications Commission and the United States of America were the respondents below. Carter/Mondale Presidential Committee, Inc. and National Association of Broadcasters were intervenors below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATUTORY QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT	7
II. THIS COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL ISSUE	17
CONCLUSION	23

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TABLE OF AUTHORITIES

CASES: Page

American Security Council Education Foundation v. *FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S.Ct. 662, —— U.S. —— (1980) 13
Buckley v. *Valeo*, 424 U.S. 1 (1976) 6
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 8, 9, 18, 21, 23
Columbia Broadcasting System, Inc. v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971) 20
Democratic National Committee v. *FCC*, 460 F.2d 891 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972) 13
Farmers Educational and Cooperative Union v. *WDAY, Inc.*, 360 U.S. 525 (1959) 19
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) .. 20
Green v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971) 13
Paulsen v. *FCC*, 491 F.2d 887 (9th Cir. 1974) 19
Police Dep't of Chicago v. *Mosley*, 408 U.S. 92 (1972) 20
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 22

CONSTITUTIONAL AND STATUTORY PROVISIONS:

UNITED STATES CONSTITUTION, Amendment I .... *passim*

Communications Act of 1934, as amended:

Section 312(a)(7), 47 U.S.C. § 312(a)(7) .... *passim*
Section 315(a), 47 U.S.C. § 315(a) 8, 9, 11, 14, 19
Section 315(b), 47 U.S.C. § 315(b) 8
Section 402(a), 47 U.S.C. § 402(a) 5

Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) 6, 15

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2342(1) 5

LEGISLATIVE MATERIALS:

117 CONG. REC. 29028 (1971) 16
S. 1, 92d Cong., 1st Sess. (1971) 16

TABLE OF AUTHORITIES—Continued

Page

S. REP. No. 92-96, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1773 9-10

S. REP. No. 92-229, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1821 16

ADMINISTRATIVE DECISIONS AND REPORTS:

Anthony R. Martin-Trigona, 66 F.C.C.2d 968, *application for review denied*, 67 F.C.C.2d 33 (1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978) 12-13, 15

Fairness Report, 48 F.C.C.2d 1 (1974) 13

Hon. Dan Walker, 57 F.C.C.2d 799 (B'cast Bur. 1975) 13

Hon. Donald W. Riegle, 59 F.C.C.2d 1314 (1976) .. 12

Hon. Pete Flaherty, 48 F.C.C.2d 838 (1974) 12

Humphrey for President Campaign, 34 F.C.C.2d 471 (1972) 11

Notice of Inquiry: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, FCC 78-204, released March 22, 1978 (BC Docket No. 78-102) 8

Paul A. Talmey, 49 F.C.C.2d 678 (B'cast Bur. 1974) 12

Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079 (1978) 8, 10-11, 12

Report and Statement of Policy Re: Commission En Banc Programing Inquiry, 44 F.C.C. 2303 (1960) 9

Rockefeller for Governor Campaign, 59 F.C.C.2d 649 (B'cast Bur. 1976) 11, 13

Rosenbush Advertising Agency, Inc., 31 F.C.C.2d 782 (1971) 9

Summa Corp., 43 F.C.C.2d 602 (1973) 11-12

Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510 (1972) 11

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Broadcasting Companies, Inc. ("ABC") hereby petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of March 14, 1980, in *CBS Inc.* v. *Federal Communications Commission*, Nos. 79-2403, 79-2406, and 79-2407.

OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, appears as Appendix A.[1] The opinions of the

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[1] Appendices A-G are contained in a separately bound volume, submitted jointly by ABC and two other petitioners —CBS Inc. (Docket No. 80-207, filed Aug. 11, 1980) and National Broadcasting Company, Inc.

Federal Communications Commission are reported at 74 F.C.C.2d 631 (1979) and 74 F.C.C.2d 657 (1979) and appear as Appendices B and C, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. Timely petitions for rehearing were denied by the court of appeals on May 15, 1980 by an order which appears as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 312(a)(7) and 315(a) and (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(7), 315(a) and (b). These constitutional and statutory provisions are set forth in Appendix G.

STATEMENT OF THE CASE

The focal point of this proceeding is Section 312(a)(7) of the Communications Act which authorizes the Commission to revoke the license of a broadcast station for "willful" or "repeated" failure to provide "reasonable access" to federal candidates seeking to purchase broadcast time. The fundamental statutory and constitutional issues flowing from the application of this important statutory provision directly impact the activities of national broadcast networks, local stations (both commercial and non-commercial), and political candidates at all levels of the federal election process.

On October 11, 1979, President Carter's media adviser, Gerald Rafshoon, requested that ABC and the

other two major television networks offer the Carter/Mondale Presidential Committee (the "Committee") a 30-minute paid program period between 8:00 p.m. and 10:30 p.m. EST during the period December 4 to 7, 1979.[2] In response, ABC advised Mr. Rafshoon that it could not comply with his request for one of the requested early December air dates but that it expected to make time available in early 1980.[3] Subsequently, ABC advised the Committee and the Commission that it had determined to make time available, responsive to such candidate requests, commencing the first week in January.[4]

On October 29, 1979 the Committee filed a complaint with the Commission, alleging that the ABC, CBS and NBC Television Networks had denied the Committee reasonable access as required by Section 312(a)(7). ABC and the other networks responded to the complaint, each explaining the basis for its decision not to sell the Committee precisely what had been requested.

In two separate orders, a deeply divided Commission[5] held that all three television networks had violated Section 312(a)(7) by refusing to make available the time requested by the Committee. The Commission also made a number of far-reaching policy determinations appli-

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[2] App. A at 5a.

[3] App. A at 8a n.6. CBS responded by stating that it was prepared to sell the Committee two five-minute segments rather than the half-hour requested. App. A at 6a n.5. NBC responded by declining the request in light of the early dates requested and the number of candidates who might seek "equal time." App. A at 8a n.8.

[4] App. A at 8a.

[5] Both orders were by identical 4-3 votes, with the majority consisting of the four Commissioners affiliated with the Democratic Party.

cable to future "access" requests. Particularly influencing the Commission's judgment was a belief that in passing upon the Committee's request, the networks should have given consideration to "the nature of the candidate's request"—*i.e.*, President Carter's "desire to set forth at the outset of a national campaign a comprehensive statement of views and to establish a framework for the organization and issues in the campaign." [6]

Chairman Ferris and Commissioners Fogarty, Brown and Quello comprised the majority. Commissioners Lee, Washburn and Jones dissented. In a separate statement, Chairman Ferris and Commissioner Fogarty expressed their view that "[f]inding the moment in time when a candidate for federal office becomes entitled to 'reasonable access' . . . is especially difficult." [7]

In dissent, Commissioner Lee stressed the far-reaching nature of the decision, representing a major and unwise change in the law.[8] Commissioner Washburn noted that what the Commission was doing, in ruling that ABC's January offer was unreasonable, was finding that a 30-day delay for the Committee's program was sufficient ground for the Commission to substitute its judgment for a network judgment.[9] And Commissioner Jones said that the facts of this case did not provide "a clear showing that the networks [had] acted in an unreasonable manner." [10]

On petitions for reconsideration by each of the three networks, the Commission on November 28, 1979 again

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[6] 74 F.C.C.2d at 650 n.33, App. B at 100a.

[7] *Id.* at 651, App. B at 102a.

[8] *Id.* at 652-54, App. B at 103a-05a.

[9] *Id.* at 653-54, App. B at 105a-07a.

[10] *Id.* at 654, App. B at 107a.

ruled in favor of the Carter/Mondale Committee.[11] Thereafter, all three networks petitioned the United States Court of Appeals for the District of Columbia Circuit for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).[12]

In an opinion by Judge Bazelon, the court of appeals affirmed the Commission's action—finding, as a preeminent matter, that Section 312(a)(7) created an affirmative right of access for individual candidates for federal elective office. In the course of so ruling, the decision established several new standards. First, it rejected broadcaster efforts to treat candidates uniformly as to when to begin the sale of political time, stressing instead the requirement of responding to the inherently subjective "needs" of individual candidates pressing such requests. Policies and practices of broadcasters that do not operate in this individual fashion were rejected as amounting to "across-the-board" prohibitions. Second, the decision found that the question of when access begins under Section 312(a)(7) depends on a finding of when the campaign begins. In this regard, the decision affirmed the Commission's judgment that a finding of when the campaign begins for these purposes is not a matter of licensee discretion, but a "legal" determination to be made by the Commission. Finally, the decision concluded that although Section 312(a)(7) by its terms

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[11] 74 F.C.C.2d 657, App. C.

[12] The Commission's orders directing immediate compliance were stayed by the court of appeals pending review. App. A at 10a-11a. Morever, referring to developments connected with the seizure of American embassy personnel in Iran, the Carter/Mondale Committee subsequently indicated that it no longer desired a 30-minute program availability during the originally requested December 4-7, 1979 period. The Committee did, however, purchase a five-minute period from CBS on December 4, 1979 and a 30-minute period from ABC on January 6, 1980. App. A at 11a.

refers only to broadcast "stations," the Commission was "justified" in applying its requirements to unlicensed networks.

Although unanimous in upholding the Commission's orders, the lower court was plainly troubled by the sensitive nature of the issues and their potential impact. Judge Tamm, concurring in the opinion, observed that the Commission's decision not only raised "grave first amendment concerns" (App. A at 56a), but had come "perilously close" to being unconstitutional.[13] Judge Bazelon noted that the majority "share[d] the first amendment concerns expressed by Judge Tamm. . . ." [14]

ABC filed a timely petition for rehearing and suggestion for rehearing *en banc* which was subsequently denied on May 15, 1980.[15]

REASONS FOR GRANTING THE WRIT

The decision in this case represents the first judicial interpretation of Section 312(a)(7) of the Communications Act of 1934.[16] The construction placed on that statutory provision by the court below gives the provision a meaning that was unintended by Congress, that unduly restricts the discretionary judgment broadcasters are permitted to exercise in allocating time to federal candidates, and that impermissibly casts the Commission

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[13] App. A at 68a.

[14] *Id.* at 47a n.117.

[15] Apps. D and E.

[16] Section 312(a)(7) was enacted as part of the Federal Election Campaign Act of 1971, approved on February 7, 1972, Pub. L. No. 92-225, 86 Stat. 3. This Court has previously reviewed other provisions of the 1971 FECA. See *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

in the role of supervising political programming—*i.e.*, deciding which candidates should be heard, to what extent and when. The fundamental question presented is whether the Commission should be permitted to so deeply intrude into this process—sitting as the ultimate arbiter of when given political campaigns have begun and determining whether the "needs" of individual candidates have been properly satisfied.

The statutory and constitutional questions presented are critically important to radio and television stations at all levels. The standards announced by the Commission and upheld by the court of appeals affect local stations and national networks with similar force. While the facts of the instant case involve a Presidential candidate requesting national network time, the standards announced necessarily apply to all broadcast stations in all federal elections. This would involve not only national campaigns for the Presidency, but primary and general elections in each state for all seats in the United States Senate and House of Representatives.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATUTORY QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT

The opinion below has in substance significantly altered the relationships of candidates, broadcasters and the Federal Communications Commission in terms of how broadcast time is to be allocated for political purposes. In ABC's view, Section 312(a)(7) confers on federal candidates a certain limited right to broadcast time that licensees are obligated to honor. This petition does not challenge that obligation.

Rather, our petition is directed to the precise nature of that right and that obligation, in the context of deciding when broadcast access for political campaigning should begin in federal elections. Even though the statute speaks

in qualified and general terms (*i.e.*, "*reasonable* access"), the court below has interpreted Section 312(a)(7) in a manner that permits the Commission to effectively mandate broadcast sales based on its own exclusive determination of when a political campaign has begun.

Set apart from the main political broadcasting provisions,[17] Section 312(a)(7) is contained in a section of the Communications Act that permits the Commission to "revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7).

By its terms, we read Section 312(a)(7) as establishing a *general* right of broadcast access for legally qualified candidates for federal elective office. It conspicuously fails to provide the terms and conditions of such access, incorporating, instead, only a concept of reasonableness. As this Court observed in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) [hereinafter cited as "*CBS* v. *DNC*"], the amendment adopting Section 312(a)(7) was intended to "essentially codif[y] the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates." 412 U.S. at 113-14 n.12 (citations omitted).

As the Commission itself has repeatedly acknowledged,[18] beyond its manifest language there is scant legis-

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[17] See Sections 315(a) and (b) of the Communications Act, as amended, 47 U.S.C. §§ 315(a) and (b).

[18] *Notice of Inquiry: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, FCC 78-204, released March 22, 1978 (BC Docket No. 78-102); *Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1087 (1978) [hereinafter cited as 1978 *Report and Order*].

lative history surrounding the enactment of Section 312 (a) (7). The absence of any legislative history elaborating upon this aspect of the statute, and the use of a simple "reasonableness" standard, indicate that, as this Court found in *CBS* v. *DNC*, Congress basically sought to codify existing practice rather than to establish significantly new standards or conditions.

Section 312(a) (7) was, in fact, enacted against a long history of Commission practice that encouraged broadcasters to offer political candidates the use of their facilities. For instance, even though by its literal terms Section 315(a)—the political broadcasting centerpiece of the Communications Act—does not grant an *initial* right of access, but only affords "equal opportunities" once a licensee permits a candidate to use a broadcasting station, the Commission's longstanding interpretive practice has been to encourage broadcast stations to make a reasonable amount of time available for political broadcasting purposes. Indeed, long before Section 312(a) (7) was added to the administrative sanctions section of the Communications Act, Commission policy held that it would be contrary to a broadcaster's overall public interest responsibilities not to afford time to political candidates.[19] It is in this sense, we submit, that Section 312(a) (7) essentially codified existing practice under Section 315(a).[20]

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[19] *Report and Statement of Policy Re: Commission En Banc Programing Inquiry*, 44 F.C.C. 2303 (1960); *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782, 783 (1971) (licensees must take into account the "public interest consideration of making their facilities effectively available to candidates").

[20] Further supporting this conclusion, the Senate Committee on Commerce commented on the new provision in a manner that was clearly commendatory of then-existing Commission practice:

[Footnote continued on page 10]

In a 1978 proceeding concerning enforcement of Section 312(a)(7), the Commission, while disagreeing with this Court's finding that this provision merely codified existing policy, nevertheless stopped short of adopting new rules or explicit policy guidelines to replace its long-standing practice of entrusting ongoing political programming decisions to licensee discretion. It stated:

> "Since the passage of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to

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[20] [Continued]

> "Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a l[e]gally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
>
> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the comm[unities] of license. The Federal Communications Commission *has recognized* this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (1960)." S. REP. No. 92-96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1773, 1787 (emphasis added).

Even if it is conceded that Congress may have intended to accomplish some purpose other than providing a new penalty to underscore the obligation of broadcasters to provide time to political candidates (as the foregoing report language suggests), there is certainly no evidence in the legislative history that Congress intended to have the Commission thrust itself into the timing of all federal campaigns and to assess the broadcasters' weighing of each candidate's individual needs.

> what constitutes 'reasonable access' under all the circumstances present in a particular case." [21]

Indeed, the most significant result of the 1978 proceeding was to reaffirm Commission reliance on licensee discretion. If the Commission believed that Section 312 (a) (7) created or required new terms and conditions for political broadcasting, it certainly took no action to implement such additional obligations.

Significantly, neither the Commission nor the court of appeals finds any meaningful support in either legislative history or past decisions that would warrant such a dramatic departure from the principle of licensee discretion. On the contrary, Section 312(a) (7) was enacted against the backdrop of a deeply engrained Commission policy that consistently afforded substantial discretion to broadcast licensees in both the political broadcasting and analogous fairness doctrine areas.[22] Thus, in a policy statement issued in the immediate wake of Section 312(a) (7)'s passage, the Commission announced its intention to resolve political access claims under that new provision by its traditional "test of reasonableness." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972). One year later, in its first *ad hoc* interpretation of Section 312 (a) (7), the Commission elaborated upon the standard it intended to follow under this provision:

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[21] 1978 *Report and Order*, 68 F.C.C.2d at 1079.

[22] It is particularly significant in this regard that even under the "equal opportunities" provision of Section 315(a) of the Communications Act—which grants opposing *legally qualified candidates a right to equivalent response time*—the Commission has recognized licensee discretion in a variety of important circumstances. *Humphrey for President Campaign*, 34 F.C.C.2d 471 (1972); *Rockefeller for Governor Campaign*, 59 F.C.C.2d 649 (B'cast Bur. 1976).

> "[W]here a licensee's judgments or policies under the circumstances represent a reasonable, good-faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)." [23]

In subsequent decisions, although cautioning licensees against certain extreme policies—*e.g.*, denying federal candidates any program time in prime audience periods at any time during the campaign [24]—the Commission specifically refused to recognize a candidate's right to a particular length of program time or to particular placement on a licensee's broadcast schedule.[25] In fact, in a ruling directly contrary to the Commission's ruling in this case, and one that the court of appeals dismisses as mere *dictum* (App. A at 26a n.59), the Commission's Broadcast Bureau concluded that "[a] licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence." *Anthony R. Martin-Trigona*, 66 F.C.C. 2d 968, 969, *application for review denied*, 67 F.C.C.2d 33 (1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978).[26]

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[23] *Summa Corp.*, 43 F.C.C.2d 602, 604 (1973).

[24] 1978 *Report and Order*, 68 F.C.C.2d at 1090.

[25] See, *e.g.*, *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974) (licensee denials of a candidate's request to program a four-and-a-half hour telethon on a specified date in support of his candidacy were held not unreasonable). See also *Paul A. Talmey*, 49 F.C.C.2d 678 (B'cast Bur. 1974); *Hon. Donald W. Riegle*, 59 F.C.C.2d 1314 (1976).

[26] In denying the reconsideration request of the senatorial candidate in that case, the Commission itself observed that

In sum, heretofore the Commission's predominant policy under Section 312(a)(7) has mirrored its policy in the political broadcasting area generally, [27] as well as practices strongly adhered to by both the Commission and the court of appeals in the analogous fairness doctrine area [28]—namely, a standard of reasonableness that affords substantial deference to licensee discretion.

The decisions below depart from these principles and the plain meaning of the statute by shifting from the broadcaster to the Commission the central role in determining the point in all federal election campaigns when political time sales must commence. Rather than good faith broadcaster determinations based on particular campaigns applied uniformly to all candidates, the court of appeals sanctions exclusive Commission determinations based on individual candidate needs. In the lower court's view, the determination as to when Section 312(a)(7) obligations attach is "purely a legal judgment" (App. A at 28a), not involving editorial discretion.[29]

"a candidate is not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes." 67 F.C.C.2d at 746.

[27] *Rockefeller for Governor Campaign*, 59 F.C.C.2d 649 (B'cast Bur. 1976); *Hon. Dan Walker*, 57 F.C.C.2d 799 (B'cast Bur. 1975).

[28] *Fairness Report*, 48 F.C.C.2d 1, 8 (1974); *Democratic National Committee*, v. *FCC*, 460 F.2d 891 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972); *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971); *American Security Council Education Foundation* v. *FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662, —— U.S. —— (1980).

[29] The "standard" for determining when time sales must begin is simply left to some form of *initial* "objective" Commission analysis of campaign "indicia." Until this official "start of the election campaign," it is observed that "no request for time need be granted." App. A at 54a. The

Under this scheme, broadcasters are effectively precluded from attempting to evaluate the impending campaign as a whole by assessing and responding to the needs of all candidates uniformly.[30] Instead, the focus has been shifted to satisfying the individual needs of candidates' pressing requests for time. In the process, the decision below relegates to virtual obscurity such factors as the number of potential candidates competing for air time and the resulting degree of program disruption.

By requiring deference to an individual candidate's perceived "needs," and by granting the Commission the exclusive domain to determine when the campaign has begun, the decision below effectively anoints the Commission as the ultimate decision-maker in all matters of political access. In this context, ABC's good faith decision to offer time for the 1980 Presidential campaign beginning in early January, 1980, but not four weeks earlier, is declared manifestly unreasonable—a process of second-guessing broadcaster judgment that defies rational ex-

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precise mechanism for resolving these matters in future cases is by no means certain. Here, of course, the "standard" was adopted after a complaint had been filed and the broadcasters had responded. In the future, will an uncertain broadcaster, faced with the first request for time in a given federal election campaign, rush to the Commission for a declaratory ruling on whether the campaign is in "full swing?" Will the Commission issue such declarations based on "all relevant facts and circumstances" (App. A at 54a) in literally hundreds of federal congressional or senatorial elections?

[30] Weighing individual candidate needs is, in fact, the very antithesis of treating candidates in the same election uniformly or as a group. It is also directly contrary to the political broadcasting tradition embodied in Section 315(a) requiring that *all* candidates be treated on an equivalent or uniform basis once broadcast facilities have been used for political appearances (*i.e.*, the "equal opportunities" concept).

planation and conflicts with deeply embedded past precedent.[31]

While the legislative history of Section 312(a)(7) is admittedly sparse, it is nevertheless clear that in enacting the Federal Election Campaign Act of 1971 Congress sought to reduce campaign costs, and that one means it envisioned as achieving that end involved shorter media campaigns. Thus, in commenting on the creation of the 60- and 45-day periods prior to general and primary elections, respectively, for the applicability of the "lowest unit rate provision," Senators Prouty, Cooper and Scott noted that "[e]veryone agrees that

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[31] In a rather remarkable "defense" of licensee discretion in these circumstances, the lower court remarked that "a counter-offer of 15 minutes as opposed to a half-hour" might have been acceptable or reasonable. App. A at 37a. Putting aside the separate difficulties and uncertainties a broadcaster would face in attempting to maintain a legal position (under the standards of this case) that a candidate's expressed needs could be satisfied by a lesser amount than the candidate continued to request, the court's suggestion merely highlights the artificial and inherently subjective nature of the required decisional process under the Commission's new standards. It also shows the real absence of licensee discretion when the ultimate determination is left to agency or judicial resolution of what is or is not reasonable based on only slight factual differences. Would 15 minutes indeed have been reasonable here and 30 minutes not if the Committee had continued to press for 30 minutes before the Commission? Was the first week of January unreasonable, but the first week of December perfectly reasonable? Was ABC, therefore, only unreasonable by a matter of three or four weeks? Would the result have been different (as in the *Martin-Trigona* case, *supra*) if the candidate were someone other than an incumbent President or a major party candidate? The mind boggles at the fine lines the Commission and the courts will be required to draw in the future.

political campaigns tend to be too long. We are hopeful that the 45- and 60-day provisions will encourage shorter campaigns." [32] In failing to address these purposes, the court of appeals decision not only contributes to the frustration of such legislative goals, it highlights the distorted different course the Commission's actions actually sanction. In other words, not only have clear legislative goals been thwarted, Section 312(a)(7) has been interpreted in a manner that is conspicuously inconsistent with the legislative scheme generally and past practice and analogous rulings in the political broadcasting area specifically.[33]

Finally, by interpreting Section 312(a)(7) in the manner indicated, the court of appeals greatly accentuates a host of constitutional problems, a subject matter we turn to in the next section.

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[32] S. REP. NO. 92-229, 92d Cong., 1st Sess. 118 (1971), *reprinted in* [1972] U.S. CODE CONG. AND AD. NEWS 1821, 1855. See also 117 CONG. REC. 29028 (1971), where Senator Pastore remarked that Section 312(a)(7) required the sale of a "reasonable amount of time" but did not permit candidates to "inundate . . . broadcasting."

[33] It should also be noted that Section 312(a)(7) was adopted after Congress had also considered but rejected proposals that would have set aside specific broadcast time periods for political campaigning. For instance, S. 1, considered by Congress contemporaneously with the bill which became the Federal Campaign Act of 1971, would have required each broadcast station and each network to make free prime time available to Presidential and Vice Presidential candidates. The bill specified the amounts of time, limited the program periods to half-hour segments, and specified the days prior to an election that the program time could be used. The bill would have required broadcasters to begin providing time approximately eight weeks before the Presidential election. S. 1, 92d Cong., 1st Sess. § 202 (1971).

II. THIS COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL ISSUE

The interpretation given Section 312(a)(7) by the court of appeals indisputably intrudes upon licensee discretion and broadcaster First Amendment rights (a requirement to schedule a program against a broadcaster's will is an intrusion—even if regarded as a permissible one). Similarly, the standards specifically sanctioned under the construction adopted by the lower court involve highly sensitive political considerations—a point emphasized by Judge Tamm:

> "The Commission, through its implementation of section 312(a)(7), has come perilously close to falling into the chasm of impermissible government action." App. A at 68a.

While the other members of the panel stated that "[t]he majority shares the first amendment concerns expressed by Judge Tamm, and welcomes the admonition regarding agency conduct that is embodied in his concurring opinion" (App. A at 47a n.117), the fact remains that a clearly political matter was decided by an agency split along party lines in favor of an incumbent President of the same party as the majority Commissioners. It is difficult to perceive a more dangerous example of, as Judge Tamm remarked, "nonneutral government decisionmaking"[34] aggravating already significant First Amendment tensions.

Despite an attempt by the court of appeals to place this case within the mainstream of past political broad-

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[34] App. A at 56a.

casting rulings,[35] the newly diminished licensee role and the heightened Commission involvement required by the decision greatly exacerbate constitutional concerns. As we have demonstrated (pp. 11-15 *supra*), the substantial discretion afforded broadcasters under all preexisting standards [including those specifically applying 312(a)(7)] has been virtually eviscerated here. Of equal significance, the discretion previously resting with licensees has been transformed into a new dictatorial role for the Commission in the partisan political process. This role is fundamentally at odds with the concept of a free press and the principle of licensee discretion embedded in the Communications Act.

In *CBS* v. *DNC*, this Court emphasized that although the singular character of broadcasting provides a condition in which some limited governmental regulation is at times constitutionally proper, the need for such regulation must always be balanced against the importance of permitting broadcasters to make their editorial choices freely:

> "The legislative history of the Radio Act of 1927, the model for our present statutory scheme, [citation omitted], reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee." [36]

The same statutory scheme that awards broadcasters editorial discretion and prohibits government censorship

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[35] For instance, at one point the lower court dismissed the constitutional contentions of the networks by, *inter alia*, suggesting that "[t]he interference with editorial discretion seems no more or less" here than under the longstanding Commission interpretation of the obligation of broadcasters to provide time to political candidates as a group under the general public interest standard. App. A at 42a-43a n.102.

[36] 412 U.S. at 105.

of program content also—in the special area of political broadcasting—recognizes that a political candidate's use of broadcast facilities should be undertaken without licensee interference. Thus, in a unique and limited reversal of the general statutory pattern, Section 315(a) of the Communications Act prohibits any censorship of broadcast material in which a legally qualified candidate appears. On its face, this provision is intended to separate broadcasters and the regulatory agency from the partisan political process; and to permit political candidates to convey the political message they wish to convey without interference.[37]

The decision below seriously threatens the neutral role that broadcasters and the government should maintain in candidate decisions regarding how broadcast facilities are used for political purposes. It does so by delegating to the Commission the "editorial" judgment of when a certain kind of political program must commence; and by premising that decision on a standard—the needs and political objectives of individual candidates—that places broadcasters (to the extent any discretion is left) and the government (in exercising an ultimate oversight function) in the prohibitive role of deciding to inaugurate broadcast campaigning based on an examination

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[37] See *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525, 528 (1959) where this Court explained that the no-censorship clause in Section 315(a) reflected a "deep hostility to censorship either by the Commission or by a licensee" over political discussion by legally qualified candidates. See also *Paulsen* v. *FCC*, 491 F.2d 887, 890 (9th Cir. 1974), where, in a different but analogous context, the Commission and a different court of appeals recognized the need to restrict the Commission's role in such matters in order to avoid "highly subjective judgments [by the agency] concerning the content, context, and potential political impact of a candidate's appearance."

of the motivations, needs, interests and purposes of individual candidates.

By focusing on the needs of *individual* candidates, as opposed to the needs of candidates *in general* in an overall campaign, the lower court decision distorts the process and places both the Commission and broadcast licensees in the dangerous position of effectively favoring one candidate over another. The prospect of a politically-appointed government agency judging the active status of a given campaign and deciding the precise point at which campaign appearances must begin raises issues that go to the heart of the First Amendment.[38] As Judge Tamm emphasized in his concurring opinion, the inherent political sensitivity of requests for access under Section 312(a)(7) "raises the serious danger of nonneutral government action favoring one speaker or viewpoint over another."[39] The highly charged circumstances of this case, involving a complaint by an incumbent President seeking reelection, highlight this danger of favoritism.[40] As Judge Tamm further observes, "members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elec-

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[38] See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745-46 (1978) where Mr. Justice Stevens emphasized that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." See also *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

[39] App. A at 67a.

[40] In failing to act upon Judge Tamm's concerns, the court below also ignored its own teachings in *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971). There, the same court observed that an FCC decision favoring an incumbent President and disregarding an earlier agency precedent "raise[d] serious questions concerning the requirement of governmental neutrality in the area of the First Amendment." *Id.* at 1034.

tions, particularly presidential contests." [41] Moreover, "there is some evidence that the Commission has, on occasion, been subjected to direct political pressure." [42]

The principle of neutral decisionmaking emphasized by Judge Tamm and articulated by decisions of this Court [43] is seriously threatened by the new standards laid down in this case—standards that stress the individual needs of candidates and make the determination as to when federal election campaigns begin for purposes of broadcast time sales a "legal" judgment of the Commission. As Judge Tamm notes, unlike the regulatory approaches under the fairness doctrine that were upheld by this Court in *Red Lion*,[44] the form of Commission

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[41] App. A at 63a (footnote omitted).

[42] *Id.* at 64a n.16. While ABC advances no suggestion that such pressure was exerted in this case, a framework nevertheless exists that would seem to call for extreme caution and agency insulation, rather than loose standards that actually depend on agency value judgments of essentially subjective factors. As Judge Tamm further observed:

> "As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking." App. A at 64a.

[43] See cases cited in note 38 *supra*. See also *CBS* v. *DNC*, 412 U.S. at 117 (opinion of Burger, C.J.).

[44] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

review sanctioned under Section 312(a)(7) permits agency review and implementing orders even though the broadcaster has made no initial choice in the presentation of particular program material. In contrast, here:

> "The danger of government nonneutrality under section 312(a)(7) is exacerbated by the Commission's emphasis, in its standards governing the right of access, on the 'individual needs' of the candidate. Whether and to what extent a candidate is entitled to broadcast access depends on a weighing of his 'individual needs' against the other relevant considerations detailed by the Commission. This evaluation may lead to a determination, for example, that a candidate requesting a half hour for a particular purpose may instead be entitled to only fifteen minutes, *see* [App. A at 37a]; another candidate, on the other hand, may be found entitled to the full half hour that he seeks.
>
> "Thus, without regard to any prior broadcast coverage of opposing candidates, an agency of the federal government is authorized to decide, based in significant part on the candidate's 'individual needs,' whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves." [45]

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[45] App. A at 62a-63a. Judge Tamm's own solution to avoiding these profound difficulties was to approach the analysis of the "individual needs" factor by "focus[ing] solely on the candidate's needs *as stated by the candidate*" —"both at the broadcaster level and before the Commission on review." App. A at 67a-68a (emphasis in original). However, if broadcasters are not required to evaluate or weigh each candidate's needs, the standard would appear to be meaningless, since any candidate requesting broadcast time obviously regards such a request as necessary to his "needs." At the same time, if broadcasters and the Commission in reviewing such requests are, in fact, required to perform a political weighing process, maintaining a neutral role in the political process becomes virtually impossible.

In sum, in failing to recognize the dangers of interjecting the Commission too deeply into the editorial process when political candidates request broadcast time, the decision in this case violates important constitutional principles. A scheme that so completely transfers decisions as to "whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves" also conflicts with this Court's concerns in *CBS* v. *DNC* that the Commission should avoid being drawn "into a continuing case-by-case determination of who should be heard and when." 412 U.S. at 127.

Accordingly, the myriad of important constitutional principles endangered by the decision in this case provide further support for review by this Court.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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see 80
207